7 C Cr. 07-011
[1989] NWTR 195

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

HER MAJESTY THE QUEEN

and

EDITH ANN HODGSON

Heard at Yellowknife, N.W.T.

on Wednesday, August 9th, 1989

REASONS FOR JUDGMENT

of

His Honour Judge R. M. Bourassa

APPEARANCES:

Ms. B. Kothe — On behalf of the Crown

Ms. V. Schuler — On behalf of the Defence

(Section 3 Fort Franklin Liquor Prohibition Regulations)

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FACTS:

The Defendant appeared in Territorial Court and pleaded guilty to an offence under Section 3 of the **Fort Franklin Liquor Prohibition Regulations:**

> Section 3:
>
> No person shall possess, purchase, sell or transport liquor within a prohibited area designated in Section 2.

She was charged specifically with 'possession'.

The Crown related the circumstances to the Court stating that the accused was found within the community and in an

intoxicated state - the fundamental assumption being that she must, therefore, have had possession of liquor (within the community) at an earlier time that day. This is a common way of advancing the Crown's position in these matters; it is rare that a Defendant in a prohibited area is actually found with the liquor on his person. More often than not the person is simply found intoxicated, and in light of that fact alone the Court is asked to assume that condition obviously resulted from an earlier possession.

When asked if the facts alleged were true, the Defendant stated that she had become intoxicated in Norman Wells and had just flown into Fort Franklin when apprehended there, and at no time while in Fort Franklin did she have liquor in her possession.

At this point the Court struck the guilty plea and the Defendant was urged to seek counsel. Ms. Schuler generously volunteered to assist the Defendant.

LAW:

Fort Franklin by way of local option has elected to be a prohibited area pursuant to Section 46 of the **Liquor Act**, prohibiting the possession, purchase, sale or transport of liquor within the settlement or municipality, and to that end has

enacted the **Prohibition Regulations.** We must assume that the Legislative Assembly of the Northwest Territories deliberately chose not to include "consumption" in the **Liquor Prohibition Regulations** as it is not prohibited in those Regulations and yet has been specifically referred to in other areas of the **Act.**

The Crown practice in most of these cases is to simply state that the Defendant was found intoxicated and invite the Court to find unlawful possession at an earlier time by inference. Depending upon the facts and circumstances of each case, it may be open to the Court to accept present intoxication as retrospectant evidence of possession such as **R. vs Dalloz,** (1908) 1 Cr. App. Rep. 258 where a driver's excessive speed was proved to support the conclusion that he was going too fast a short distance further back. However, in my view this is a dangerous path as this case demonstrates.

A preferred practice would be for the Crown to aver possession at the earlier time in order that the Defendant (usually unrepresented) could at least be made aware of the issue - possession - before the Court and then be in a position to admit or deny the allegation.

I note that the **Liquor Act** provides in Section 85, Section 76(10), and Section 76.1, specific prohibitions with

respect to the consumption of liquor which, depending on the particular Section, may or may not constitute an offence that may be prosecuted. On an offence of unlawful possession in a prohibited area such as before me, intoxication is not the alleged offence.

In my view, unlawful possession contemplated by Section 3 of the **Fort Franklin Liquor Prohibition Regulations** (and others) must be interpreted in its normal criminal context requiring the Crown to prove knowledge and control. In that regard, I question whether the momentary handling of one proffered glass of liquor and its ingestion is such a possession. It may be more in the nature of consumption. All of the Code provisions and the leading cases speak of an existing real item, and knowledge or control over it, direct or presumptive. In cases under the Prohibition Regulations, the liquor is gone - or at best, present in some partially metabolized state in the Defendant. I cannot accept as persuasive the argument that the presence of liquor, evidenced by intoxication, in a person's body, is possession in law.

My conclusions are these: On guilty pleas, where the only Crown evidence of anterior unlawful possession is present intoxication, it must aver to the anterior possession which, of course, must be admitted as true by the Defendant.

On trials of these matters, proof of actual or constructive possession of liquor, beyond a reasonable doubt is required, keeping in mind that the particular facts and circumstances adduced may, on occasion, be received as retrospectant evidence justifying the inference of possession.

Finally, that proof of intoxication simpliciter is not present possession of liquor in law.

In this case the Crown proved intoxication only, which in my view is insufficient proof of unlawful possession in this case.

Judge R. M. Bourassa